SUPREME COURT, U. S.

FILED

DEC 3 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-806

NATIONAL PETROLEUM REFINERS ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE FOR THE NATIONAL RETAIL MERCHANTS ASSOCIATION

IRA M. MILLSTEIN
IRVING SCHER
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022
Attorneys for Amicus Curiae

December 3, 1973

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BRIEF AMICUS CURIAE FOR THE NATIONAL RETAIL MERCHANTS ASSOCIATION

Interest of Amicus Curiae

The National Retail Merchants Association ("NRMA") is a national trade association representing more than 2,000 department store and specialty store members, which operate some 26,000 retail outlets throughout the United States. Its members range from the largest nationwide department store chains to small neighborhood apparel stores.*

* NRMA has received consent from the parties to file this brief in support of the petition for a writ of certiorari. Consent was received from the Solicitor General by letter dated November 27, 1973, and consent was received from petitioners by letter dated November 29, 1973. Both letters have been filed with the Clerk of this Court.

The principal business of NRMA members is to sell goods to and provide services for consumers. Virtually every phase of their advertising, marketing and service activities is subject to the prohibitions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (hereinafter "Section 5") against unfair methods of competition and unfair or deceptive trade practices.

Section 5 embraces the antitrust laws. It embodies as well additional principles designed to reach less defined anti-competitive behavior. It also draws upon the common law and upon basic community concepts of business propriety. Through almost sixty years of enforcement, Section 5 has been given content by decisions of the Commission based upon facts developed and tested in adjudications, with full rights to contest and full judicial review on the basis of a factual record. While five Commissioners thus have broad discretion, that discretion is saved from administrative fiat by the constraint that decisions be based upon probative and tested facts.

The decision below would now vest in the five Commissioners the authority to issue substantive rules of business conduct under the Federal Trade Commission Act. This is authority to hand down the law based upon such facts or nonfacts as the Commission may choose, and to entertain comment with minimal obligation to take heed. It would permit the Commission to practice legislative art subject only to the possibility that a court, handicapped by the absence of a genuine record of probative facts, may find Commission pronouncements "arbitrary or capricious." Given the reach of the Federal Trade Commission Act and the breadth of the standards under Section 5, the authority is, in fact, power to regulate by code every detail of the American economy.

The effect of the decision below can be seen in its impact upon the microcosm of the retailer. The new authority

to regulate reaches into the myriad day-to-day advertising, selling and marketing practices of each of NRMA's retailer members. That has been the actual fact during the past few years in which the Commission has first ventured to assert its newly claimed code power.* Indeed, the thousands of categories of merchandise and services advertised and sold by NRMA members, and their varying methods of purchase, distribution, and marketing, make it difficult to envision trade regulation rules which would not have an impact upon retailers.

As the court below observed, the question of whether the Commission is "empowered to promulgate substantive rules of business conduct" is an "important" one (Petitioners' Appendix, p. 31). The question goes far beyond the merits of the Octane Posting Trade Regulation Rule involved in this case, 16 C.F.R. § 422 (1972), or any other particular trade regulation rule. Were the Commission simply asserting its authority to state its views of the law to the public, to indicate its enforcement intentions, or to furnish guidance in the form of advice, this would be consistent with the principles that have governed in the past. But that is

* NRMA has in recent years submitted statements to the Federal Trade Commission in connection with such trade regulation rules as those dealing with: the incandescent lamp industry, 16 C.F.R. § 409 (1971); retail food advertising and marketing practices, 16 C.F.R. § 424 (1971); discriminatory practices in the men's and boys' tailored clothing industry, 16 C.F.R. § 412 (1968); care labeling of textile wearing apparel, 16 C.F.R. § 423 (1972); cooling-off periods for door-to-door sales, 16 C.F.R. § 429 (1972); and the preservation of consumer claims and defenses, 36 Fed. Reg. 1211 (1971). Representatives of NRMA have appeared and testified at hearings held by the Commission with respect to a number of these proposals. In each of these submissions or appearances, NRMA has either specifically addressed the issue involved in this case, or it has referred to and reaffirmed its views on this issue expressed in previous submissions. Thus, NRMA has upon a number of occasions been directly involved in the significant issue of administrative law which is being sought to be resolved herein.

not the case. The authority here asserted to regulate the market place by code is a revolutionary break with the past.

The issue cannot be left unresolved. With the decision of the court below, the Commission will proceed to issue its codes, and businesses must continue to operate in the market place. Under these circumstances, the promulgation of rules does its greatest disservice to the public, to those who seek to comply with the law, and to those who in good faith may disagree.

REASON FOR GRANTING THE WRIT

The decision of the Court below will radically alter the regulation of the American economy.

The decision below radically alters the manner in which the federal government has enforced the trade regulation laws.

In the past, Section 5 has been enforced on a case-by-case basis through careful development of record facts and comprehensive judicial review of the fact-finder's application of the law to those facts. If the decision below is upheld, the Commission will in the future be able legislatively to make new law simply by giving notice of the action it proposes to take, receiving comments from the public, and taking final action on the basis of those comments and any other matters it deems relevant, whether or not they are part of the record. The Commission need not have any factual evidence to support its action; it need only give a brief statement of the reasons for its rules, which a reviewing court (including this Court) is then constrained to accept unless they are clearly arbitrary and capricious.*

* *Compare* Sections 7 and 8 of the Administrative Procedure Act, 5 U.S.C. §§ 556-57, pursuant to which the Commission has in the past proceeded, *with* Section 4 of that Act, 5 U.S.C. § 553, which the decision below now permits the Commission to utilize. See 5 U.S.C. §§ 701-706 for the different standards of proof and judicial review applicable to these two sets of proceedings.

The decision below has the following results.

1. The decision converts the Commission into a substitute-Congress. It confers an expansive power to proscribe by virtually *ex parte* determinations every and any detail of the manufacture, sale, pricing, distribution, retailing, financing, advertising, promotion, and point-of-sale presentation of every product and service, whenever the Commission concludes that they are "unfair".* This constitutes "delegation running riot." *A. L. A. Schecter Poultry Corp.* v. *United States,* 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). It renders superfluous other specific Congressional enactments throughout the field of economic regulation. It provides the basis for endless expansion and diffusion by Commission trade regulation rules of federal and state legislation. For example, the "Four Installment Rule" under the Truth-in-Lending Act, recently considered by this Court in *Mourning* v. *Family Publications Serv., Inc.,* 41 U.S.L.W. 4517 (U.S. Apr. 24, 1973), could equally be comprehended in a Commission trade regulation rule.

2. The decision substitutes Commission administrative fiat for more than half a century's judicial development of the antitrust and related laws. It emasculates the traditional role of the courts. Antitrust law has been developed and applied against the backdrop of full record facts which

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* The unlimited reach of the rule-making authority upheld by the court below is starkly revealed by its recognition that the Commission's rulemaking authority cuts deeply into and "widely across virtually all of American business" (Petitioners' Appendix, p. 52), and that it is:

> "tantamount to a power to scrutinize and to control, subject of course to judicial review, the variety of contracting devices and other means of business policy that may contradict the letter or spirit of the antitrust laws" (*Id.*).

This Court's decision in *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233 (1972), of course, extends the reach of Section 5 far beyond just the letter or spirit of the antitrust laws.

courts are peculiarly suited to ascertain and develop. This Court has itself insisted upon the need to establish antitrust principles upon a full understanding of the factual stuff of which business practices are made. See *White Motor Co.* v. *United States,* 327 U. S. 253, 263 (1963). Yet if the decision below is left unexamined, the courts, including this Court, will no longer have any meaningful role whenever the Federal Trade Commission chooses to act by rulemaking. Such rules can never be tested against an evidentiary record or probative facts, and will be subject to reversal by the courts only if they are clearly arbitrary and capricious.

3. The decision destroys the development of the entire statutory framework of enforcement of the Federal Trade Commission Act.

Underlying the historical, unquestioned technique of permitting the Federal Trade Commission to expand what can be included within the meaning of "unfair methods of competition" or "unfair or deceptive acts or practices" in all nationwide commerce was the recognition that those who desired to regulate, and administratively to write new law, would have to do so on *facts* adduced by sworn testimony subjected to the acid test of cross-examination. No suggestion as to the need for efficiency or expedition in the administrative process can negate that fundamental of due process in the expansion of Section 5.

But the concept of the court below that "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce may be fleshed out administratively by binding rules is the antithesis of this Court's interpretation of Section 5. In the historical sweep from the dissent of Mr. Justice Brandeis in *FTC* v. *Gratz,* 253 U. S. 421, 429 (1920), to this Court's opinion in *FTC* v. *Sperry & Hutchin-*

son Co., 405 U. S. 233 (1972),* it has been recognized that the Commission would first issue a complaint charging that certain alleged activities constitute a violation of Section 5 and should be proscribed; an adjudicatory hearing would then be held for proof as to the facts alleged; a record would be made; findings of fact entered; and the Commission's factual determinations and legal conclusions would then be subject to judicial review.

Given the sweep of the statute over every area of industrial and business activity, it was never intended by Congress or suggested by this Court that the Federal Trade Commission could by *a priori* determination itself write new binding substantive rules. It was never suggested that without an adjudicatory hearing, a record, and findings of fact based on sworn testimony tested on the anvil of cross-examination, the Commission could substitute merely an opportunity for unsworn comment in the form of oral or written statements; that the Commission could in part base its new law-making on its own data never revealed for examination or even comment; or that the Commission's ultimate determinations could be shielded from judicial reversal unless found to be clearly arbitrary and capricious, rather than lacking in substantial support on the basis of an official record as a whole. *Cf. Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951).

To the contrary, as this Court has stated in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167 (1962) (relied upon more recently in *Sperry & Hutchinson Co., supra*),

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* *See also FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304 (1934); *FTC* v. *Beech-Nut Packing Co.*, 257 U. S. 441 (1922); *Cream of Wheat Co.* v. *FTC*, 14 F.2d 40 (8th Cir. 1926); *Toledo Pipe-Threading Mach. Co.* v. *FTC*, 11 F.2d 337 (6th Cir. 1926); *Oppenheim, Oberndorf & Co., Inc.* v. *FTC*, 5 F.2d 574 (4th Cir. 1925).

> "Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion."

For this reason, the "agency must make findings that support its decision, and those findings must be supported by substantial evidence." 371 U.S. at 168. It is impossible to believe that when this Court confirmed the Commission's expansive substantive authority in *Sperry & Hutchinson, supra,* it was intended that Commission action pursuant to such authority could be based on surmise, accumulated "expertise" and other information not sworn, tested by cross-examination, or even placed in an official record. But that would be the effect of the decision below if it is not reversed.

It is the Court of Appeals' amalgamation of public utility, transportation, communication, collective bargaining, and other types of comprehensive regulatory authority with the unlimited substantive power it finds was granted to the Federal Trade Commission (Petitioners' Appendix p. 52) that must be examined by this Court. No license, no certification, no compliance with rate making is required to engage in every aspect of American business. Substantive rulemaking in the field of public utilities, communications, transportation, security dealings, collective bargaining, and the like, rests not only on comprehensive controls, but also on developed agency expertise in the specific area of control. It can hardly be asserted that a single agency, the Federal Trade Commission, possesses ubiquitous expertise in every other facet of the American economy.

It is respectfully submitted that the decision below was erroneous on a question of importance to the future legality of virtually every act or practice in the entire economy. Review by this Court is essential.

Respectfully submitted,

IRA M. MILLSTEIN
IRVING SCHER
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022
Attorneys for Amicus Curiae

December 3, 1973

CERTIFICATE OF SERVICE

I, IRA M. MILLSTEIN, hereby certify that on this 3rd day of December, 1973, copies of the Brief Amicus Curiae for the National Retail Merchants Association On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia were personally delivered to the office of the Solicitor General, Department of Justice, Washington, D. C. 20530 and to the office of William Simon, Esq., c/o Howrey, Simon, Baker & Murchison, 1730 Pennsylvania Avenue, N.W., Washington, D. C. 20006, counsel for petitioners; and that a copy of the above-referenced brief was mailed, postage prepaid, to the Secretary of the Federal Trade Commission, Washington, D. C. 20580. I further certify that all parties required to be served have been served.

/s/
IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10022
Attorney for Amicus Curiae